MS Elevators Engineering Sdn Bhd v Jasmurni Construction Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(W)-627–03 OF 2018 AND W-02(C)(W)-645–03 OF 2018

AHMADI ASNAWI, SURAYA OTHMAN AND STEPHEN CHUNG JJCA

20 JUNE 2019

Contract — Damages — Liquidated and ascertained damages ('LAD') — Whether defendant failed to prove its claimed LAD sum against plaintiff — Whether facts showed plaintiff was only one among several subcontractors responsible for the delay in completion of entire building contract — Whether defendant could not show exact number of days of delay attributable to plaintiff — Whether in circumstances trial judge was entitled to use common-sense approach to assess LAD on the evidence based on proportionality

The developer of a commercial project ('the employer') appointed the respondent as its main contractor to carry out works. The respondent, in turn, appointed the appellant as a nominated subcontractor to supply and install lifts in several buildings in the project. Following the completion of its subcontract and the certification of the final contract value of the entire project, the appellant sued the respondent for an unpaid balance sum of RM1,337,989.74. The respondent refused to pay the amount contending, inter alia, that because of the appellant's delay in completing its work the respondent had to pay RM3,910,000 to the employer by way of liquidated and ascertained damages ('LAD'). The respondent pleaded the said sum by way of set off and counterclaim against the appellant. The terms and conditions of the subcontract and the main contract were identical, including the provisions on LAD and the commencement and completion dates of works. Following a trial, the High Court allowed the appellant's claim in the principal sum of RM1,235,670.74 and the LAD counterclaim in the sum of RM977,500. The appellant's instant appeal was against the LAD award while the respondent appealed against the whole of the decision of the trial court. At the joint hearing of both the appeals, the appellant argued that the trial judge should not have allowed the LAD sum of RM977,500 because the delays were caused by the respondent's failure to give the appellant possession of the lift-related areas to carry out its work. The respondent, on the other hand, argued that the appellant's claim was premature as it was not certified by way of a final payment certificate and was based merely on a statement of final account of the entire contract. The respondent also submitted that its LAD counterclaim against the appellant was based on a delay of 292 days and that the trial judge should not

have reduced the sum claimed to RM977,500 based on a delay of only 146 days.

Held, dismissing both appeals:

(1) It was not disputed that apart from the appellant, other subcontractors were involved in the project and that the respondent could not complete the project within the 24 month contract period. The delays were not due solely to the appellant. The respondent and the other subcontractors were also responsible. The respondent was unable to pinpoint the specific number of days of delays caused solely by the appellant. The employer had imposed LAD of RM7,820,000 (RM68,000 x 115 days) against the respondent. After negotiations, the figure was reduced to RM3,910,000 based on 57.5 days. The respondent claimed this sum as actual loss against the appellant. This negotiated and arbitrary figure did not support the respondent's LAD claim against the appellant for 292 days. The respondent was not entitled to the 292 days. In any event, 292 days of delay did not add up to RM3,910,000. The respondent could not use the 115 or 57.5 days to claim the LAD. It also failed to produce any other proof of reasonable loss or compensation that it was entitled to. The trial judge was entitled to adopt a common-sense approach in assessing the damages. On the evidence before him, he assessed the LAD at RM977,500 and gave his reasons for his assessment based on proportionality. On the facts and circumstances, he was not plainly wrong (see paras 17, 27 & 29–30).

(2) After the appellant had submitted its final claim, the records showed that the respondent did not submit the claim to the M&E engineer, the QS and architect for valuation and certification. Therefore, no payment certificate was issued and no payment made. However, the architect had issued the certificate of completion. The respondent could not then argue that since there was no payment certificate, the subcontractor was not entitled to payment. On the facts and circumstances of the case, the payment certificate was not a prerequisite for payment to be made (see para 21).

(3) The statement of final account valued the final contract sum at RM4,092,760. This statement was signed by the architect, employer, appellant and respondent. The respondent did not challenge the statement of final account or claim that it was entitled to set off against defective works. The respondent did not submit that the statement was obtained fraudulently or that there were arithmetical errors in the computation. The parties did not refer their dispute to arbitration but accepted the final account. Clause 26.10 stated that the final account shall be conclusive on the final value of the subcontract works. Based on the final account, the trial judge allowed the appellant's claim after

deducting the retention sum of RM1,235,670.74. The judge was not plainly wrong and there was no reason to interfere with his decision (see paras 23–24).

[Bahasa Malaysia summary

Pemaju projek komersial ('majikan') telah melantik repsonden sebagai kontraktor utamanya untuk menjalankan kerja. Responden, seterusnya, telah melantik perayu sebagai subkontraktor yang dicalonkan untuk membekal dan memasang lif di beberapa bangunan dalam projek tersebut. Berikutan subkontrak itu siap dan pengesahan kontrak akhir keseluruhan projek, perayu telah menyaman responden untuk jumlah baki tidak berbayar sebanyak RM1,337,989.74. Responden enggan membayar jumlah tersebut dengan menegaskan, antara lain, bahawa oleh kerana kelewatan perayu menyiapkan kerjanya responden terpaksa membayar RM3,910,000 kepada majikan melalui ganti rugi jumlah tertentu dan ditentukan ('GRJTD'). Responden telah mempli jumlah tersebut melalui penepian dan tuntutan balas terhadap perayu. Terma dan syarat subkontrak dan kontrak utama adalah serupa, termasuk peruntukan berhubung GRJTD dan tarikh mula dan siap kerja. Berikutan perbicaraan, Mahkamah Tinggi telah membenarkan tuntutan perayu berjumlah RM1,235,670.74 dan tuntutan balas GRJTD berjumlah RM977,500. Rayuan perayu ini adalah terhadap award GRJTD manakala responden telah merayu terhadap keseluruhan keputusan mahkamah perbicaraan. Semasa perbicaraan bersama kedua-dua rayuan tersebut, perayu berhujah bahawa hakim perbicaraan tidak patut membenarkan jumlah GRJTD sebanyak RM977,500 kerana kelewatan yang disebabkan oleh kegagalan responden memberikan perayu milikan kawasan yang mempunyai lif untuk menjalankan kerjanya. Responden, sebaliknya, berhujah bahawa tuntutan perayu adalah pramatang kerana ia tidak disahkan dengan perakuan bayaran akhir dan adalah berdasarkan hanya kepada penyata akaun akhir keseluruhan kontrak. Responden juga berhujah bahawa tuntutan balas GRJTDnya terhadap perayu adalah berdasarkan kelewatan 92 hari dan bahawa hakim perbicaraan tidak patut mengurangkan jumlah yang dituntut kepada RM977,500 berdasarkan kelewatan untuk hanya 146 hari.

Diputuskan, menolak kedua-dua rayuan:

(1) Ia tidak dipertikaikan bahawa selain daripada perayu, subkontraktor lain terlibat dalam projek tersebut dan bahawa responden tidak boleh menyiapkan projek tersebut dalam tempoh 24 bulan. Kelewatan tersebut bukan hanya disebabkan oleh perayu sahaja. Responden dan subkontraktor lain juga bertanggungjawab. Responden tidak dapat membuktikan bilangan hari kelewatan secara spesifik yang disebabkan semata-mata oleh perayu. Majikan telah mengenakan GRJTD berjumlah RM7,820,000 (RM68,000 x 115 hari) terhadap responden. Setelah berunding, angka tersebut telah dikurangkan kepada

RM3,910,000 berdasarkan 57.5 hari. Responden menuntut jumlah ini sebagai kerugian sebenar terhadap perayu. Angka yang dirunding dan sewenang-wenangnya itu tidak menyokong tuntutan GRJTD responden terhadap perayu untuk 292 hari. Responden tidak berhak kepada 292 hari tersebut. Dalam apa keadaan, 292 hari kelewatan itu tidak setimpal dengan jumlah RM3,910,000. Responden tidak boleh menggunakan 115 atau 57.5 hari untuk menuntut GRJTD itu. Ia juga gagal mengemukakan apa-apa bukti lain untuk kerugian atau pampasan munasabah yang ia berhak. Hakim pericaraan berhak mengguna pakai pendekatan akal fikiran dalam menaksir ganti rugi. Berdasarkan keterangan di hadapannya, beliau telah menaksir GRJTD berjumlah RM977,500 dan memberi sebab untuk taksirannya berdasarkan perkadaran. Berdasarkan fakta dan keadaan, beliau tidak salah (lihat perenggan 17, 27 & 29–30).

(2) Setelah perayu mengemukakan tuntutan akhirnya, rekod menunjukkan bahawa responden tidak mengemukakan tuntutan kepada jurutera M&E, QS dan arkitek untuk penilaian dan pengesahan. Oleh demikian, tiada perakuan bayaran telah dikeluarkan dan tiada bayaran telah dibuat. Walau bagaimanapun, arkitek telah mengeluarkan perakuan siap. Responden tidak boleh sekarang berhujah bahawa oleh kerana tiada perakuan bayaran, subkontraktor tidak berhak kepada bayaran. Berdasarkan fakta dan keadaan kes, perakuan bayaran bukan prasyarat untuk bayaran yang dibuat (lihat perenggan 21).

(3) Penyata akaun akhir menaksir jumlah kontrak akhir berjumlah RM4,092,760. Penyata ini telah ditandatangani oleh arkitek, majikan, perayu dan responden. Responden tidak mencabar penyata akaun akhir atau tuntutan yang ia berhak untuk penepian terhadap kerja yang defektif. Responden tidak mengemukakan bahawa penyata tersebut telah diperoleh secara fraud atau bahawa terdapat kesilapan aritmatik dalam pengiraan itu. Pihak-pihak tidak merujuk pertikaian mereka kepada timbang tara tetapi menerima akaun akhir. Fasal 26.10 menyatakan bahawa akaun akhir adalah konklusif berhubung nilai akhir kerja subkontrak itu. Berdasarkan akaun akhir itu, haim perbicaraan membenarkan tuntutan perayu selepas memotong jumlah tahanan berjumlah RM1,235,670.74. Hakim tidak salah dan tiada sebab untuk campur tangan dengan keputusannya (lihat perenggan 23–24).]

Notes

For cases on liquidated and ascertained damages, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 5024–2025.

Cases referred to

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2018] MLJU 1935; [2019] 1 AMR 737, FC (refd)

A *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445, FC (refd)
Ling Heng Toh Co v Borneo Development Corpn Sdn Bhd [1973] 1 MLJ 23, FC (refd)
Renofac Builder (M) Sdn Bhd v Chase Perdana Berhad [2000] MLJU 752, HC
B (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (refd)
Tuck Sin Engineering & Construction Sdn Bhd v Yee Heng Manufacturing (M) Sdn Bhd [2007] MLJU 416, HC (refd)
C

Legislation referred to

Contracts Act 1950 s 75

D **Appeal from:** Suit No WA-22C-57–09 of 2016 (High Court, Kuala Lumpur)

David Samuel (Chambers of Firdaus) for the appellant.
CC Kok (Ong & Kok) for the respondent.

E **Stephen Chung JCA (delivering judgment of the court):**

THE APPEALS: BACKGROUND FACTS

F **[1]** In these appeals, the parties will be referred to as the plaintiff and defendant respectively as in the High Court suit. The plaintiff was in the business of design, consultation, installation, repair and maintenance of lifts and escalators whereas the defendant was in the construction business.

G **[2]** Kensington Vision Sdn Bhd, developer of a project in Bandar Putra Permai, Selangor (the employer), appointed the defendant as its main contractor. By a letter of acceptance dated 31 January 2013 (LOA), the defendant appointed the plaintiff as a nominated subcontractor for the supply, installation, testing and commissioning of 22 lifts for Blocks A, B and C and shoplots in the project for a contract sum of RM4,005,760 plus maintenance
H contract of RM294,240 during 24 months defect liability period.

[3] The plaintiff claimed a balance sum of RM1,337,989.74, as amended, including variations, after it had completed the works. The defendant did not pay but countered that the plaintiff had delayed in completing the works which
I entitled the defendant to set off against its claim for liquidated and ascertained damages ('LAD') at the contractual rate of RM68,000 per day. The defendant contended that due to the delays, it had to pay LAD amounting to RM3,910,000 to the employer which exceeded the plaintiff's claim. The defendant set off and counterclaimed for this sum against the plaintiff.

[4] After a trial, the learned judge ordered the defendant to pay the plaintiff a sum of RM1,235,670.74 with interest thereon at 5%pa from the date of the final account statement dated 28 March 2017 until full settlement. In respect of the counterclaim, the learned judge ordered the plaintiff to pay the defendant a sum of RM977,500 with interest thereon at 5%pa from the date of the counterclaim from 11 October 2016 until full settlement and for the parties to bear their own costs.

[5] The plaintiff appealed against the judgment in allowing the LAD of RM977,500 and the defendant appealed against the whole decision of the learned judge. Both appeals were heard together.

THE PLAINTIFF'S SUBMISSION

[6] The plaintiff submitted that it filed the suit on 7 September 2016 based on its records without the benefit of the final account for works done. On 24 February 2017 the final account was made available which was approved by all parties, namely the employer, defendant, plaintiff and the M&E engineer and then amended its claim to incorporate the figures of the final account for the balance of RM1,337,989.74. It submitted that it was not precluded to claim based on the final account.

[7] The plaintiff referred to the defendant's position that the plaintiff should not be paid on the progress claims which were not certified by the architect because the plaintiff should submit the progress claims to the defendant which would submit to the architect, M&E engineer and the quantity surveyor ('QS') and for the M&E engineer to verify the value of work done. The M&E engineer would issue his certificate to the QS for him to do his valuation of works done and then for the architect to issue the progress certificate before the plaintiff was entitled to be paid. The plaintiff submitted that it was the fault of the defendant because DW3 had testified that the defendant did not send the plaintiff's progress claims to the M&E engineer for certification.

[8] The plaintiff submitted that on 15 March 2016 the architect had issued the certificate of practical completion ('CPC') that the works had been satisfactorily completed and the final account had been issued which was verified by all parties including the defendant. It submitted that it was therefore entitled to claim based on the final account.

[9] The plaintiff referred to the defendant's counterclaim premised on the LAD at RM68,000 per day which alleged that the plaintiff did not adhere to the completion date stipulated in the third work program. The plaintiff submitted that despite overwhelming evidence that the defendant was not

A entitled to the LAD, the learned judge had allowed a portion of the LAD amounting to RM977,500 and had erred. It was submitted that the learned judge failed to appreciate that the defendant had caused delay and did not give possession of the lift related areas to the plaintiff for it to carry out its works which resulted in the plaintiff being unable to adhere to the third work B program which was not its fault.

[10] It was submitted that the defendant had the burden but failed to prove any such subsequent date wherein possession as per contract was granted to the C plaintiff and the learned judge ought to have dismissed the defendant's claim. It submitted that the defendant failed to prove that the actual loss suffered was attributable to the plaintiff.

THE DEFENDANT'S SUBMISSION

D

[11] The defendant submitted that the plaintiff's claim was based on the statement of final account which was not a payment certificate. It was submitted that a final payment certificate must be issued before payment of the final accounts under cl 26.9 which was a condition precedent for payment. It E was submitted that the plaintiff did not produce the final payment certificate which entitled the plaintiff to the payment claimed.

[12] It was submitted that the plaintiff's claim was premature. It submitted that the learned judge erred in failing to distinguish that the statement of final F accounts was conclusive of the final contract sum and not a payment certificate. It submitted that in allowing the plaintiff's claim without the payment certificate, the learned judge failed to apply the contractual terms which jeopardised the defendant's interest in that the defendant had lost the right of set off under cll 26.13 and 16.1 of the subcontract. It submitted that this would G set a precedent for litigants to claim payment before the final payment certificate was issued.

[13] The defendant submitted that it was a prerequisite for the plaintiff to obtain an extension of time pursuant to cl 21.5 of the PAM subcontract for any H delay to complete its work program as stipulated otherwise LAD would apply. The defendant contended that the plaintiff did not obtain the necessary extension and therefore was entitled to the LAD. It submitted that once the delay ended, the plaintiff was required to issue a notice under cl 21.5(b) to claim the final extension of time but did not do so.

I

[14] The defendant submitted that it claimed a delay of 292 days for LAD of RM3,910,000. The defendant submitted that the learned judge took the simplistic view that the delay on part of the plaintiff was counted from the day the plaintiff's letters of complaint ceased on 23 September 2015 until the date

the PMA license was obtained on 16 February 2016. It submitted that the learned judge had erred in arriving at 146 days of delay only and erred in awarding only RM977,500 to the defendant.

THE COURT'S DECISION

[15] Based on the appeal records, we set out the salient facts which will form the basis of our judgment. By a letter of award dated 24 October 2012, the employer appointed the defendant as its main contractor for the project for a fixed lump sum price of RM138,000,000 to be completed within 24 months from date of commencement of 17 December 2012, completion date on 16 December 2014. The defendant in turn appointed the plaintiff as its nominated subcontractor for the installation and commissioning of the lifts for the project. The terms and conditions of the subcontract including LAD were based on those in the main contract.

[16] Pursuant to the letter of acceptance ('LOA'), the plaintiff entered into the subcontract based on the PAM form of agreement and schedule of conditions of building contract 2006, (without quantities). The dates of commencement and for completion would follow the main contractor's work program and all the works physically, practically and satisfactorily completed would be certified by the M&E engineer and architect. The plaintiff was to prepare and submit detailed work program subject to architect's approval before commencing work. Some of the terms were amended via two letters, dated 6 March 2013 and 16 April 2013. In the event the plaintiff's work program did not correspond with the defendant's work program, the plaintiff was prepared to reschedule its work program to suit the defendant's work program provided that reasonable time frame be allowed for the plaintiff to deliver, install, test and commission the lifts.

[17] It was not in dispute that other subcontractors were involved in the project and that the defendant could not complete the project within the 24 months contract period, namely by 16 December 2014. The completion date was extended to 30 April 2015, which was further extended. The employer wrote a letter dated 19 March 2015 to the plaintiff complaining that Bomba lift for all three blocks were not delivered and installed on site up to date. By a letter dated 25 March 2015, the plaintiff submitted a revised lift installation work schedule (third work program) to the defendant. The dispute between the plaintiff and the defendant was in respect of the third work program. The plaintiff complained that it was not given possession of the site to enable it to proceed.

[18] The records showed that by a letter dated 18 August 2015, addressed to the defendant, the architect refused to issue the certificate of practical

completion ('CPC') because all the lifts for Blocks A, B, C and the 12 units of shops were not completed. The employer gave notice to the defendant to impose LAD of RM7,820,000 incurred up to 23 September 2015. By an email of 23 November 2015, the employer required the plaintiff to coordinate closely with the main contractor (defendant) to remedy the defects for JKKP inspection within two days. The architect finally issued the certificate of completion, dated 15 March 2016, certifying that the works were practically completed on 29 February 2016.

[19] On 4 December 2015 the plaintiff submitted its final claim amounting to RM1,058,644 to the defendant for payment. The claim was adjusted, as amended, after it received the statement of final account dated 24 February 2017. The defendant contended that the plaintiff's claim was premature because there was no payment certificate issued which would entitle the plaintiff to claim payment. The defendant submitted that the issuance of the certificate was a prerequisite to payment, citing several authorities including *Ling Heng Toh Co v Borneo Development Corpn Sdn Bhd* [1973] 1 MLJ 23; *Renofac Builder (M) Sdn Bhd v Chase Perdana Berhad* [2000] MLJU 752 and *Tuck Sin Engineering & Construction Sdn Bhd v Yee Heng Manufacturing (M) Sdn Bhd* [2007] MLJU 416 in support.

[20] Under para 23 of the LOA, with the heading 'Method of Payment for Nominated Sub-contractor', the plaintiff was required to submit progress claim to the defendant every first day of third week of each month to be incorporated into the defendant's progress claim to be certified by the architect. The payment would be made by the employer in separate cheque drawn in favour of the plaintiff forwarded through the defendant as the main contractor. The LOA did not provide nor referred to any payment certificate. This was provided for in cl 26.0 of the PAM subcontract 2006. Clause 26.3 stated that when issuing any payment certificates, the architect 'shall also indicate separately any amount due to the Sub-contractor' and the payment 'shall be made within seven (7) days' after the period of honouring the certificates.

[21] Based on the plaintiff's 13th progress claim for RM656,904, the previous claims had been certified amounting to RM3,229,856 for payments. RM2,754,770.26 had been paid. The plaintiff submitted its final claim dated 16 November 2015 and 4 December 2015. The records showed that the defendant did not submit the claim to the M&E engineer, QS and architect for valuation and certification. Therefore no payment certificate was issued and no payment made. However the architect had issued the certificate of completion. The defendant could not then argue that since there was no payment certificate, the subcontractor was not entitled to payment. On the facts and circumstances of the case, the payment certificate was not a prerequisite for payment to be made.

[22] Under cl 26.7, within three months after practical completion of the subcontract works, the subcontractor 'shall send to the contractor with copies to the architect and consultant all documents necessary for preparing the final account. The final account shall be completed within six months from receipt of all the documents'. In this case the statement of final account was issued on 24 February 2017, after the suit was filed. The plaintiff applied to amend its claim which was allowed. On the facts, the learned High Court judge was correct in allowing the amendment.

[23] The statement of final account valued the final contract sum at RM4,092,760. This statement was signed by the architect, employer, plaintiff and the defendant. The defendant did not challenge the statement of final account or that it was entitled to set off against defective works. The defendant did not submit that it was obtained fraudulently or that there were arithmetical errors in the computation. The parties did not refer their dispute to arbitration. The parties had accepted the final account. Clause 26.10 stated that the final account shall be conclusive on the final value of the subcontract works.

[24] Based on the final account, the learned High Court judge allowed the plaintiff's claim, as amended, after deducting the retention sum, in the sum of RM1,235,670.74. On the appeal records, he was not plainly wrong and there was no reason for us to interfere with his decision as such.

[25] Regarding the appeal on the LAD, on the facts, in particular the correspondence above referred to, clearly there were delays in completion of the works, with each blaming the other for the delays. The third work program set out the commencement date and completion date with JKKP certification for each phase of work. The plaintiff complained that it was not given possession of the site and not provided with sufficient electricity to enable it to install, test and commission the lifts and should not be penalised with the LAD. The defendant among others submitted that the notes in the third work program in respect of the hand over were not part of the contract. Whether they should be implied or part of the contract, under the LOA the plaintiff was required to prepare and submit detailed work program to the defendant and employer for approval by the architect. The plaintiff had proceeded with the works under the third work program although there were delays in completion. Some of the delays were due to other subcontractors because the lift shafts were yet to be completed.

[26] The plaintiff was to complete the third work program on 30 May 2015. On 30 September 2015 the defendant wrote to the plaintiff complaining on the delay. By 15 October 2015, the employer expressed disappointment and dissatisfaction to the plaintiff on the current status of the lifts for the shops till to date. The defendant sent reminders, for example on 21 October 2015,

A 11 November 2015 and 4 December 2015 for delays and the consequent LAD to be imposed. The plaintiff obtained PMA certification for lift A2 on 31 October 2015 and finally, certification for the shops on 16 February 2016. It was clear there were delays on the part of the plaintiff in completing the works. The plaintiff did not apply for any extension of time.

B

[27] As stated above, by a letter dated 21 October 2015, the employer imposed LAD amounting to RM7,820,000 (RM68,000 x 115 days) incurred up to 23 September 2015 on the defendant. After several discussions, the employer and the defendant agreed to reduce the LAD to 57.5 days calculated C at RM3,910,000, which was deducted from the contract sum due to the defendant. This was not in dispute. The defendant claimed this sum as actual loss against the plaintiff. The parties and the learned High Court judge had referred to *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374 and *Johor Coastal Development Sdn Bhd v* D *Constrajaya Sdn Bhd* [2009] 4 MLJ 445 on damages under s 75 of the Contracts Act 1950 ('the CA'). These two cases must be read in the light of the latest decision of the Federal Court in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2018] MLJU 1935; [2019] 1 AMR 737.

E

[28] The burden was on the party seeking to enforce a damage clause under s 75 of the CA to adduce evidence that there was a breach and that the contract contained a clause specifying a sum to be paid upon breach. In the event of a dispute as to what constituted reasonable compensation, the burden was on the F defaulting party to show that the damage clause including the sum stated was unreasonable: *Cubic Electronics*. After the LOA and the plaintiff had entered into the subcontract, the plaintiff did not complain that the LAD clause or that the sum specified therein were illegal or unfair or unreasonable.

G **[29]** Based on the letter dated 23 September 2015 by the consulting engineer, the M&E works had been completed save for the lift works for the shops and the learned High Court judge found that the CNC dated 30 June 2015 was issued by the defendant to seven other subcontractors including the plaintiff. The delays were not due solely to the plaintiff. The defendant and the H other subcontractors were also responsible for the delays. The defendant was unable to pinpoint the specific number of days of delay due solely to the plaintiff. However the defendant claimed for 292 days calculated from 30 April 2015–16 February 2016.

I **[30]** The LAD for 115 days up to 23 September 2015 had been reduced to 57.5 days only, which was a negotiated and arbitrary figure. The 115 or 57.5 days did not support the defendant's claim for 292 days and the defendant was not entitled to the 292 days. In any event, a simple calculation showed that 292 days did not add up to RM3,910,000. The defendant also could not use the

115 or 57.5 days to claim the LAD. The defendant did not produce any other proof of reasonable loss or compensation that it was entitled to. The learned High Court judge was entitled to adopt a common sense approach in assessing the damages. On the evidence before him, the learned High Court judge assessed the LAD at RM977,500 and had given his reasons for his assessment. This was based on proportionality. On the facts and circumstances, he was not plainly wrong.

[31] For the reasons we have given, we have dismissed both the appeals and parties to bear their own costs.

Both appeals dismissed.

Reported by Ashok Kumar